

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL CENTER FOR LAW AND
ECONOMIC JUSTICE, INC.
275 Seventh Avenue, Suite 1506
New York, New York 10001-6708,

Plaintiff,

Civil Action No.

V.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
OFFICE FOR CIVIL RIGHTS
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Declaratory Judgment Act for injunctive, declaratory, and other appropriate relief. Plaintiff National Center for Law and Economic Justice, Inc. (“NCLEJ”) seeks the release of records from Defendant United States Department of Health and Human Services (“HHS”), Office for Civil Rights (“OCR”). The records in question were provided to HHS by the Wisconsin Department of Children and Families (“Wisconsin DCF”) pursuant to the terms of a Voluntary Compliance Agreement between the OCR and the Wisconsin DCF. NCLEJ is statutorily entitled to the disclosure of the records it seeks, but the HHS has improperly withheld them.

Jurisdiction, and Venue

2. This Court has subject-matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

Parties

4. NCLEJ is a domestic not-for-profit corporation, organized under the laws of the State of New York, that seeks to advance the cause of economic justice for low-income families, individuals, and communities across the country. NCLEJ works to protect the rights of individuals in welfare programs, including individuals with disabilities. To support these advocacy efforts, NCLEJ sought the production of these records from the OCR.

5. The HHS is an agency within the meaning of 5 U.S.C. § 552(f). The HHS is the federal agency with possession and control of the requested records and is responsible for responding to NCLEJ's FOIA request. The OCR is a component of the HHS.

Statutory Framework

6. FOIA requires that each federal agency make non-exempt records "promptly available to any person" upon request. 5 U.S.C. § 552(a)(3)(A).

7. The "basic purpose" of FOIA "reflect[s] 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, at 3 (1st Sess.1965)). "[N]othing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, except as specifically stated'" *Id.* at 361 (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)). Thus, the exemptions provided by 5 U.S.C. § 552(b) are

“exclusive” and “must be narrowly construed.” *Id.* Indeed, the Obama Administration has recognized as much, instructing all executive departments and agencies that:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. . . . In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Memorandum of President of the United States, Jan. 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009), *reprinted in* 5 U.S.C. § 552 app. at 42-43 (2010).

8. Under 5 U.S.C. § 552(b)(7)(A), “records or information compiled for law enforcement purposes” are exempted from production, “but only to the extent that the production of such law enforcement records . . . could reasonably be expected to interfere with enforcement proceedings.”

9. If an agency has “improperly withheld” its records from the person making the FOIA request, that person may file a complaint in the United States District Court for the District of Columbia, requesting the court “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

10. Under 5 U.S.C. § 552(a)(6)(C)(i), a person making a FOIA request “shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions” for an appeal.

11. Under 5 U.S.C. § 552(a)(6)(A)(ii), the agency must “make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.” Likewise, under the HHS’s regulations, HHS “will decide an appeal within 20 working days after the appeal reaches the appropriate review official.” 45 C.F.R. § 5.35(b)(2).

Facts Giving Rise to NCLEJ’s Claim

12. In 2002, the American Civil Liberties Union (“ACLU”) of Wisconsin and Legal Action of Wisconsin both filed administrative complaints with OCR against the Wisconsin DCF, alleging violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act by the State of Wisconsin’s Temporary Assistance for Needy Families program, called Wisconsin Works (“W-2”). The ACLU’s complaint also contained a claim under Title VII of the Civil Rights Act of 1964, alleging that the W-2 program was discriminating on the basis of race.

13. In April 2010, the complaints were settled through a Voluntary Compliance Agreement (“the Agreement”) entered into by OCR and the Wisconsin DCF, recorded as OCR Transaction Numbers 02-00727, 02-00728, 02-00729, 02-00730, 02-00731, and 02-00734. *See* attached Exhibit A.

14. Pursuant to Section VII.A of the Agreement, the Wisconsin DCF agreed to collect and report certain data to the OCR to demonstrate compliance with the Agreement.

15. By letter dated April 6, 2011, NCLEJ submitted a FOIA request to HHS, seeking the data that the Wisconsin DCF was required to report to the OCR by the Agreement, including the information, records, and reports required by Section VII.A of the Agreement. *See* attached Exhibit B.

16. By letter dated May 16, 2011, HHS denied NCLEJ’s request, explaining:

[T]he cited transactions have been encompassed within a new transaction that is an open and ongoing investigation, and that the subject matter of your request is the subject of this investigation. Therefore, I have determined to withhold all records within the scope of your request, in their entirety, under the provisions of (b)(7)(A). Exemption (b)(7)(A) permits the withholding of investigatory records compiled for law enforcement purposes when disclosure could reasonably be expected to interfere with enforcement proceedings. The new Transaction number is CORR-02-00727.

See attached Exhibit C.

17. By letter dated June 21, 2011, NCLEJ appealed the HHS's decision to deny NCLEJ's FOIA request. NCLEJ noted that Section IV of Agreement itself contemplated that the information provided by the Wisconsin DCF, pursuant to Section VII of the Agreement, may have to be disclosed under FOIA. In addition, NCLEJ noted that the Agreement only provides for "compliance" and "monitoring" and does not provide for opening a new investigation or enforcement proceeding. *See attached Exhibit D.*

18. In addition, NCLEJ's appeal argued that the exemption under 5 U.S.C. § 552(b)(7)(A) did not apply to NCLEJ's FOIA request and could not be used by HHS as a basis for refusing to disclose the records. Specifically, NCLEJ's appeal stated that the OCR could not show that there is an enforcement proceeding already underway or that there is a legitimate prospect that such a proceeding will be initiated. Likewise, NCLEJ's appeal stated that OCR cannot demonstrate that disclosure of the requested information would interfere with an enforcement proceeding, especially when there is no current or prospective enforcement proceeding.

19. On August 16, 2011, having received no response from HHS, counsel for NCLEJ emailed HHS to inquire about its appeal.

20. Shortly after NCLEJ's August 16, 2011 email, HHS and counsel for NCLEJ spoke on the phone. HHS's counsel stated that it was working on the appeal and that its initial review of the appeal would be finished within a few days.

21. To date, HHS has not responded to NCLEJ's June 21, 2011 appeal. Likewise, since August 2011, HHS has not responded to any of NCLEJ's phone calls or correspondence inquiring about the status of the appeal.

**Count I: Violation of the Freedom of Information Act for
Wrongful Withholding of Agency Records**

22. NCLEJ incorporates by reference paragraphs 1-21 of this Complaint as though fully set forth herein.

23. HHS has wrongfully withheld the agency records requested by NCLEJ in its April 6, 2011 FOIA request and June 21, 2011 appeal because no statutory basis exists for HHS's refusal to produce the requested records. Specifically, the exemption under 5 U.S.C. § 552(b)(7)(A) does not apply because there is no enforcement proceeding pending, no legitimate prospect of such an enforcement proceeding, and no risk that producing the records requested would reasonably interfere with an enforcement proceeding.

24. NCLEJ has exhausted its administrative remedies with respect to its April 6, 2011 FOIA request and June 21, 2011 appeal.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

(1) Declare that Defendant has violated FOIA by refusing to provide the records requested in Plaintiff's April 6, 2011 FOIA request and June 21, 2011 appeal;

(2) Declare that Plaintiff is entitled to the disclosure of the requested records;

(3) Order Defendant HHS and its component OCR to disclose immediately and in their entireties all records responsive to Plaintiff's April 6, 2011 FOIA request and June 21, 2011 appeal;

(4) Provide for expeditious proceedings in this action;

(5) Award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and

(6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

By:



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Attorney for Plaintiff
National Center for Law and Economic Justice,
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Dated: February 13, 2012